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No. 86-546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW ORLEANS PUBLIC SERVICE INC.,

Petitioner,

v.

THE CITY OF NEW ORLEANS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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BRIEF FOR THE CITY OF NEW ORLEANS IN RESPONSE TO THE "BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE"

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BRIEF FOR THE CITY OF NEW ORLEANS IN RESPONSE TO THE "BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE"

This brief is filed pursuant to Rule 22.6 in response to the Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae, filed in *American Electric Power Co. v. Kentucky Public Service Commission*, No. 86-49 ("the Government Brief"). The Government Brief[1] addresses review here and was served upon the parties to this action.

STATEMENT

The Government urges this Court to review a case that was prematurely and improvidently commenced, has been settled in substance, represents no conflict and is consistent with established law. After the FERC allocated Grand Gulf I costs to NOPSI as a wholesale rate, the Council confronted complex retail ratemaking issues—within its *exclusive* jurisdiction. The Government omits mention of any such issues. For example, in order to address the "severe rate shock effect" (Pet. at A-38.) portended by a 60 percent rate increase, the Council was entitled to consider rate "phase in" (or "levelization"), that graduates the increase over time to alleviate its impact.

The FERC's own administrative law judge declared that levelization had to be decided by local regulators: "The design of local retail rates to ultimate consumers is a matter within the jurisdiction of the states. . . . in light of the clear bright line which the Federal Power Act sought to draw between Federal and state jurisdiction over electric

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[1] References to the parties and other participants here are in the same form as in the respondent's principal brief. The Solicitor General and the FERC are, together, referred to as "the Government"; and their brief as ("G.Br."). References to respondents' principal brief are in the form ("CNO Br.").

utilities. *F.P.C. v. Southern California Edison, Co.*, 376 U.S. at 215-16." *Middle South Energy, Inc.*, 26 FERC ¶ 63,044 at 65,148. NOPSI's lawsuit, which sought a mandatory, immediate and full pass-through, was entirely inappropriate.[2]

A. The Federal Power Act

The Government's presentation of the Federal Power Act omits any reference to the reservation of regulatory powers to the states. Section 201 of the Act, 16 U.S.C. § 824(a) concludes, "such Federal regulation, however, to extend only to those matters not subject to regulation by the States." The Act denies FERC jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1).

In *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1964), the Court concluded that Congress had "apportioned regulatory power between state and federal governments." *Id.* at 211 and adopted the *Attleboro* "bright line" that preserved the states' traditional role in setting local retail rates. *Id.* at 214-15.

The Government's refusal to acknowledge this limit is paralleled in its treatment of the "filed rate doctrine." Its impact on state retail regulatory powers was recently explicated in *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986). *Nantahala* bears on abstention by

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[2] The local regulator must also consider how customer classes (industrial, commercial and residential) should bear the increase and can inquire into public interest issues that may suggest the desirability of cost absorption by a utility. It is not invariably in a utility's interest to pass on costs fully, which might initiate the "death spiral" effect of "rate shock." That is, business and low-income residents, leave or go bankrupt. Unpaid costs are then borne by a diminished customer base. This triggers a new round of failures, leaving the utility in a financially untenable position.

illustrating how a claim of preemption involving the filed rate doctrine may properly be dealt with. The decision was rendered on appeal from the North Carolina Supreme Court. Regulatory issues had been allowed to develop within the state system, for ultimate review by this Court.

There, the FERC had adopted a formula for allocation of costs between utilities located in different states. The state simply adopted a different formula as the basis for retail rates. The Court held that the "filed rate doctrine" barred adoption of a contradictory formula and required the state to pass through costs in order to avoid their "trapping." 106 S. Ct. at 2359. The Court held, however, that traditional retail ratemaking actions (*e.g.*, recognition of offsetting costs) could properly be taken. *Id.* at 2357-58.[3]

B. Proceedings Before the Counsel

The Government (pp. 10-15, 27) would portray NOPSI as having suffered unjustified administrative delay.Although the matter before the Council required factual and expert presentations, it could have been conducted more expeditiously, but for NOPSI's strategy. Even so, the time was a fraction of what the FERC took in the Grand Gulf I matter and other typical FERC and judicial, proceedings require. The Fifth Circuit found that there was no "bad faith, harassment or other exceptional circumstances," and indicated a different result if there had been. (Pet. at A-24.) The Government also omits to state that NOPSI sought a billion dollars in damages from members of the Council personally, apparently for intimidation. (Compl., par. 33.) Instead of participating responsibly, NOPSI bypassed opportunities for relief and sought to exhaust the Council's resources through litigation. (See Pet. at A-39.)

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[3] *See* note 2 *supra*. Moreover, although the prudence inquiry is not before the Court in this case, it should be noted that the *Nantahala* case did not involve managemental imprudence. See discussion *infra*.

NOPSI filed its application to increase retail rates just two days after the Council reacquired regulatory authority from the state commission. While the Council required time to institute orderly procedures, it acted responsibly throughout. For example, on July 17, 1985, after public hearing and technical review, the Council authorized NOPSI to issue $60,000,000 in securities. (R. Def. Ex. P.) The Council, on its own initiative, set a hearing on interim rate relief, Resolution R-85-423, and later provided relief.

During the proceedings NOPSI sought delays in setting of filing requirements, delayed submission of information, ignored invitations to seek interim relief, and testified, in the face of expert evidence, that it would become insolvent in September, 1985. It claimed inability to recapture the $32 million "advance payment" it had made (based on the improper allocation that the FERC had rejected), though, at the Council's instance, it did so. The Council enabled NOPSI to remain current on its Grand Gulf I payments throughout.

DISCUSSION

A. The case was correctly decided below.

The Government concedes the availability of abstention and that there is no *per se* rule against abstention in a federal preemption case (G.Br. 10, 22, n. 13); and that abstention depends upon "the particular preemption claim at issue." (*Id.*) It contends, however, that there can be no abstention if there is a "preemption claim based on the filed rate doctrine" (*id.*), arguing for special treatment of FERC decisions.

Both courts below found a compelling need for *Burford* abstention here. The Fifth Circuit stated that, "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory scheme is complex. In addition, the Louisiana state courts are fully able

to address NOPSI's complaints about Council actions. . . ." (Pet. at A-19.)[4] Yet the Government contends that there were "no state law or policy concerns" present here. (G.Br. at 17.) Moreover, it denigrates abstention where the proceeding is before a state administrative body (G.Br. 14-20, especially n. 11). The law is to the contrary. *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 349 (1951), *See also Robert-Gay Energy Enterprises Inc. v. State Corporation Commission of Kansas*, 753 F.2d 857 (10th Cir. 1985); *Browning-Ferris, Inc. v. Baltimore County, Maryland*, 774 F.2d 77 (4th Cir. 1985); *Allegheny Airlines, Inc. v. Pennsylvania Public Utilities Commission*, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973). The Council's authority is on equal plane with LPSC; in fact, NOPSI derives its authority to operate from the Council.[5]

The three part test of *Younger* was also met here.[6,7] This Court's recent decision in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986), is virtually dispositive. The Court of Appeals held that a state administrative proceeding—which involved selection criteria for teachers, "intrusive" actions and con-

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[4] The Fifth Circuit could also have held that the court should not become involved in the unnecessary determination of constitutional questions—here under the Supremacy Clause, on premature challenge, based on an undeveloped regulatory record—under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

[5] *See* Louisiana Annotated Statutes § 33-4405; New Orleans Ords. Nos. 6822 and 7068.

[6] Section 4-1604 of the 1954 Home Rule Charter, provides for prompt judicial review of the Council's actions. The Court is empowered to grant plenary relief. *See* La. Const., Art. 4, § 21(E). Louisiana courts have vigorously enforced the filed rate doctrine. (CNO Br. p. 17 n. 22.)

[7] *See Middlesex County, Ethics Committee v. Garden State Bar Assn.*, 457 U.S. 423, 432-43 (1902); *United Services Automobile Association v. Muir*, No. 85-5662 (3d Cir. Jun. 6, 1986) *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1017 (3d Cir. 1981).

tinuing surveillance[8]—violated the complainant school's Constitutional rights. 766 F.2d 932, 942-43, 961-62 (6th Cir. 1985). This Court reversed, noting that the school's claims could be raised at state level. It restated that it is, "perfectly natural for our cases to repeat time and time again that the *normal* thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." 106 S. Ct. at 2723. (Emphasis by the Court.)

The Government contends that *Younger* is inapplicable here, claiming erroneously that NOPSI participated in a "multistate 'common pool' " and that a decision one state has "a corresponding direct adverse effect on the citizens of other participating states," (G.Br. at 18). The Council never acted, and it would have been inappropriate to speculate that its decision would burden other states. The Council also disclaimed any action that would have NOPSI bear any costs other than those assigned by the FERC (Resolution No. R-85-636). Moreover, each of NOPSI's three sister operating companies, also allocated Grand Gulf costs, entered into rate agreements that involved "phase-in" plans and cost absorption.[9] These did *not* have a "corresponding direct adverse effect" on NOPSI, and its president so testified.[10]

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[8] The state had sought extensive discovery and used its "coercive tools" to compel practices inconsistent with complainant's tenets. 766 F.2d at 950-51.

[9] *Arkansas Power and Light Company*, Docket No. 84-249-U, Order No. 26 (Arkansas Public Service Commission, Sept. 9, 1985); *Mississippi Power and Light Company*, Docket No. U-4620, Final Order on Rehearing (Mississippi Public Service Commission, Sept. 16, 1985); *Louisiana Power and Light Company*, Order No. U-16945 (Louisiana Public Service Commission, Nov. 14, 1985).

[10] Deposition of James M. Cain, December 23, 1985, *In the Matter of Ex Parte Application of New Orleans for An Increase of Its Electric Rates* (Docket No. CD 85-1), pp. 125-131.

B. There is no conflict among the circuits.

As to the Government's claim that abstention is never warranted "in the context of a preemption claim based on the filed rate doctrine," there is clearly no conflict since *not one* court has suggested such a rule. Because *all five* of the cases proffered by the Government are distinguishable, there is no conflict at all.

(1) In *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d 1111 (3d Cir. 1986), the court declined to abstain where a particularized state response had been fully articulated—by *all three* branches of the government. 791 F.2d at 1113, 1114, 1118.

(2) In *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985), the state proposed to void *ab initio* the agreements with respect to Grand Gulf, 772 F.2d at 408, so that the utility might avoid *any* costs assigned by the FERC, *id.* at 411. There was *complete* preemption.

(3) In *Aluminum Company of America v. Utilities Commission of the State of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), the court abstained where the state commission had taken substantive action; the state courts were in an "advanced stage" of considering the matter, 713 F.2d at 1029; and fact-finding would be required as to the effect of the utility commission's order. *Id.* at 1030.

(4) In *Appalachian Power Co. v. Public Service Commission of West Virginia*, No. 86-2540 (4th Cir. Mar. 4, 1987), previously briefed,[11] the same court demonstrated willingness to reach a preemption claim, and it barred a state prudence inquiry where the particularized issues were *identical* to those already determined by the FERC. (Slip Op. at 13).

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[11] Respondents' Brief In Opposition To Petitioner's Third Supplemental Brief, Filed March 30, 1987.

(5) In *American Electric Power Company, Inc. v. Kentucky Public Service Commission*, the Sixth Circuit affirmed abstention under *Younger*, (although it held *Burford* inapplicable because the state commission had *already acted*) because of parallel proceedings in the state court.

C. Other Factors Bearing on Review.

The abstention issue is important only if the Court were to upset the particularized consideration that now characterizes court decisions. If local regulators were stripped of their powers to moderate increases, there would be irreparable economic damage, the Congressional judgment in favor of localized adjustment would be undermined, and utilities would be encouraged to exhaust local resources by litigation that sought federal intrusion into a traditionally state process—a course followed by NOPSI here.

The Government erroneously asserts that utilities will be subjected to "irreparable damages".(G.Br. at 23). Local regulators can grant *interim* relief and provide for recovery of costs borne during the proceeding. (Resolution No. R-85-526.) Financial planning by utilities is customarily based on an interlude for regulatory consideration. The claim that it is not lawful in most jurisdictions to allow for costs incurred during the regulatory interim is specious.[12] In fact the rate agreement here included recovery

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[12] The Government concedes that Resolution No. R-85-526 allowed NOPSI to recover costs incurred during regulatory consideration, but suggests that the Council "appears not to have the authority to make that guarantee." It cites only *Louisiana Power & Light Co. v. Louisiana Public Service Comm'n.*, 377 So.2d 1023, 1027-1029 (La. 1979). That case addressed the different problem posed when a utility "surcharged" retroactively a class of ratepayers to recover a refund made to a different class, and it does not address regulatory inclusion of deferred costs in rates. NOPSI earlier raised this argument in *Middle South Energy, Inc. v. The City Council of New Orleans*, Civ. Action No. 85-5273 (E.D. La., Dec. 11, 1985) (*"NOPSI II"*) but was met by undisputed testimony that the Council's action conformed with others nationwide, all under state laws barring "retroactive ratemaking."

of such costs. Instead, the Government would subject communities to irreparable damage because it is impossible to reconstitute closed businesses or repatriate residents forced to relocate as a result of rate shock. However, no court has adopted the Government's position.

The states' obligation to reflect costs allocated by the FERC has just been explicated in *Nantahala*, relied upon by the court below. Since *Nantahala* applies to wholesale costs of "joint financing and power production arrangements," which the Government posits as a basis for review here (G.Br. 22), there is no need to review the issue.

Finally, any decision here would be rendered in the context of a FERC allocation which may itself be ephemeral. The appeal of its decision will be reheard *en banc* "limited to the issues raised by the dissenting opinion." *Mississippi Industries v. FERC*, No. 85-1611, (D.C. Cir. Apr. 3, 1987). That dissent found untenable the FERC's allocation of nuclear plant costs that failed to remedy the disparities which it held discriminatory. *Id.*, Slip Op. at 1-3 (D.C. Cir. Jan. 6, 1987) (Bork, J., dissenting).

D. Comparison with the AEP case

The Government concedes that the issue here is "blemished by procedural problems" (G.Br. 23), but argues for review here, but not in *AEP*. In *AEP*, the state commission had already acted. Here, the complaint was filed before the Council had a chance to act, and while NOPSI bypassed opportunities for interim relief.[13] In *AEP*, the controversy is active; here, it has been settled.

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[13] The Government contends that *Younger* abstention is inappropriate because the Council's ratemaking proceedings are "essentially a legislative function." (G.Br. 19 n.11) They are no more "legislative" than the FERC's own. The hearings are governed by rules of procedure, provide for cross examination, are fully transcribed, result in written decisions, and are subject to state court review (*see* n.6 *supra*). The Government's suggestion that the Council's deliberations should be ov-

E. The Prudence Proceedings.

The Government misstates that NOPSI's complaint "necessarily includes" a challenge to the prudence inquiry. It did not, and the Fifth Circuit conducted no review of it. The inquiry was initiated after the complaint here was filed (Res. R-85-636, Oct. 17, 1985). Moreover, NOPSI commenced an entirely separate action, challenging that inquiry, "*NOPSI II*," now pending before the Fifth Circuit.

The Government also misstates that the prudence inquiry was causally related to the Council's alleged refusal (which did not occur) to reflect NOPSI's costs in retail rates. In fact, the rate agreement was implemented *notwithstanding* the inquiry. The complaint in *NOPSI II*, conceded that "Defendants failure to grant adequate rate relief is not at issue in the present case." (Compl. Par. 10.)

The Government asserts that the Council has no authority to conduct a prudence inquiry even though FERC has conducted no such inquiry. (*See* CNO Br. at p. 5, n.6.) Resolution, R-85-636 declares that, "the Council will not seek to . . . order NOPSI to pay MSE a rate other than that approved by the FERC." The prudence hearings, now complete, have focused on whether NOPSI's management acted imprudently in respects which would *not* disturb its interstate commitments. It is improper to presume that the Council will act in a manner violating its Constitutional responsibilities. More important, this issue is not before the Court in this case.

CONCLUSION

For these reasons the petition should be denied.

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erridden because it is popularly elected denigrates those who have responsibility to an electorate and would disqualify a substantial number of state trial and appellate courts. The suggestion that the Council might act improperly here because it also is considering a proposal to municipalize NOPSI, merits no reply. The same argument would undermine the integrity of the New York State Public Utility Commission with respect to the Long Island Lighting Company, since the Commission is appointed by the Governor, who is championing state takeover of that utility. Wall St. Journal, Jan. 15, 1987, at 10, col. 1.

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